Petitioner

v.

Respondent

BRIEF OF THE RESPONDENT,
ROBERT PLEASANTS,
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

ROY A. COOPER, III
ATTORNEY GENERAL OF
NORTH CAROLINA

Counsel for Robert Pleasants,
Respondent

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1838

JERRY PAUL,
Petitioner

v.

ROBERT PLEASANTS,
Sheriff, Wake County,
Raleigh, North Carolina
Respondent

BRIEF OF THE RESPONDENT,
ROBERT PLEASANTS,
Sheriff, Wake County,
Raleigh, North Carolina
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is JERRY PAUL v. ROBERT PLEASANTS, Sheriff, Wake County, Raleigh, North Carolina, 551 F2d 575 (4 Cir 1977) which affirms the order of Honorable Algernon Butler (75-0268-HC EDNC 1976), unreported. A copy of both are included in the Petition, pp A13, A18 respectively.

JURISDICTION

The jurisdiction of the Court has been invoked pursuant to 28 USCA, Section 1254(1); and the petition was filed within the statutory ninety days from March 31, 1977, the date of the

order denying rehearing on the order, review of which is sought.

QUESTIONS PRESENTED

1. WAS THE NOTICE OF PETITIONER'S CONTEMPT CONSTITUTIONALLY ADEQUATE?
2. WAS THE TRIAL JUDGE REQUIRED TO RECUSE HIMSELF?

STATEMENT OF THE CASE

On July 15, 1975, the *voir dire* of prospective jurors in a North Carolina murder case, State v. Joan Little, was progressing. During the examination of the thirteenth juror, Jennie Lancaster, the episode at the base of this petition occurred. The state passed the juror, an employee of the Department of Correction, and the defense then questioned her. During the questioning, the trial judge, Honorable Hamilton Hobgood, appeared to register some dismay at the questions asked and indicated that he thought the defense was taking too much time. A defense member then claimed that defense had taken one hour and forty-five minutes as opposed to the state having taken one hour and fifty-four minutes. The judge registered surprise at this. To this point, the defense questions had involved such matters as whether Ms. Lancaster would attend her college again if she had it to do over; how she felt about her department's rehabilitation program; whether her income was more or less than $7,500.00 a year; and whether she gave any type of tests to prisoners. The judge, however, permitted questioning to continue and after the matters of pre-trial publicity and participation in social and religious organizations were delved into by the defense, the prospective juror was then asked about her reading habits and the following ensued:

"BY MR. PAUL FOR THE DEFENSE:

Q. All right, do you take any magazines?

MR. GRIFFIN: OBJECTION.

COURT: SUSTAINED. I'm going to have to get right down to — I will rule on every time you object.

Q. Do you read much?

A. Yes.

Q. All right, what do you read?

MR. GRIFFIN: OBJECTION.

COURT: OVERRULED.

A. Magazines and novels.

Q. What type of magazines?

MR. GRIFFIN: OBJECTION.

COURT: SUSTAINED.

MR. PAUL: If your Honor please, may I approach the bench.

COURT: Yes sir.

(Counsel approach bench)

COURT: I am just busting up your system right now. All right madam, will you go back to the jury room.

(NOTE: Miss Lancaster returns to a jury room.)

COURT: All right, I'll hear you now.

MR. PAUL: If your Honor please, there is no reason that we should be bound to the traditional way of picking the jury.

COURT: Probably isn't, but that's exactly what we are going to do as from this minute on.

MR. PAUL: If your Honor please, to do that denies us due process and denies us the opportunity to effectively pick good jurors.

COURT: All right now do you want to put that in the

record? I suppose you are taking that down (addressing court reporter)

MR. PAUL: We have developed a method of selecting the best jurors. For the Court to ignore the advances made in social sciences and other sciences, the aid in selecting fair jurors, is to return to a hundred years ago and makes absolutely no sense whatsoever.

COURT: I believe if it is necessary the Appellate Court has, in the last day, from you, a broad spectrum of your questions, you know, of what you're trying to do. I have my doubts — I had my doubts about it yesterday morning, but I wanted to give you full opportunity to present it, for possible appellate review. Now I want you to move to the Court, which you are now doing, that you be allowed to continue as you have started, which you are now doing.

MR. PAUL: That's what we're doing now.

COURT: All right, denied.

MR. PAUL: If your Honor, please, any questions the State asks, they are allowed to ask. I think the Court has shown bias in this case in favor of the State.

COURT: All right, you can put that in the record.

MR. PAUL: And isn't giving us a fair trial.

COURT: All right, I'll let you put that in the record.

MR. PAUL: And there is no sense in the Court not allowing us to proceed in an orderly fashion when we have not disrupted the Court and we have not prolonged the examination. Our questions are only phrased in a little bit different way. Our questions take shorter time than the State's do. The only difference is our questions are not traditional.

COURT: That's right.

MR. PAUL: And that being the only difference.

COURT: No, it is not that, because I think the record will disclose the type of questions and the length it has taken. I will let the record speak for that.

MR. PAUL: The time that we have kept on it shows the State has taken longer in examining jurors than we have.

COURT: I don't agree with that.

MR. PAUL: We have evidence that it has and that they have taken longer.

COURT: All right, anything else you want to say?

MR. PAUL: The only reason I can see that your Honor is now cutting us off is because we are gaining an advantage and your Honor is favoring the State and your Honor is proceeding in such a manner to insure Joan Little's conviction.

COURT: All right, you got that in the record.

MR. PAUL: And at this point we ask your Honor to recluse [*sic*] yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the queen of hearts off with the heads because the law is the law is to take us back a hundred years.

COURT: All right.

MR. PAUL: And we intend to ask these questions. Now your Honor, they can object and you can sustain, but we intend to keep on asking the questions and in order for the appellate court to rule whether or not they were proper

questions we have to ask the questions. It is apparent I'm quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. Now we intend to ask these questions and you can sustain the objections if you want to but the appellate court cannot make a ruling on whether or not they were proper questions unless the questions are asked.

COURT: All right, you have said that twice. I haven't said you couldn't ask the questions.

MR. PAUL: And the appellate courts cannot make a judgment on whether or not the questions would have been relevant unless they got the witness' answer into the record.

COURT: Well, I'll pass on that. Are you through?

MR. PAUL: I'm through for the m o m e n t but not through for this trial.

COURT: Yes sir. All right, let the jurors return to the courtroom.

PROSPECTIVE JUROR LANCASTER RESUMES WITNESS STAND.

The following day, Judge Hobgood gave petitioner a record of the above, found as a fact that it occurred, and described it as "instance number 1 in reference to Mr. Paul", but said no more about it in Court. On July 21, 1975, the judge advised petitioner that he would be cited for contempt on the return of the verdict for his statements above. On August 9, 1975, Judge Hobgood prepared the order and informed petitioner that the number of days had been left blank. On August 12, 1975, the judge advised petitioner he would hear a statement on the matter from petitioner, if petitioner desired, after the jury had retired.

When the jury retired, Judge Hobgood praised counsel, stating petitioner was "a very good lawyer . . . a very intense lawyer" and told him he had won the case. He then asked if petitioner "want[ed] to say something before . . .", whereupon petitioner broke in and in effect stated that his actions were not taken out of dislike or belittlement but only as a part of a dialogue of growth, and then went on to state:

> "And if it is necessary for a person, who lives under Dr. King's philosophy, to call upon themselves punishment or harshness because of speaking out, then they know what they're doing, that; and they accept that gladly, but they at no time hate or despise or dislike the other person or the person they were talking to. And they also hope that out of that grows the dialogue which results in a better understanding."

The judge then stated he liked petitioner and referred to him again as "a good lawyer", saying it was "for publication".

When the jury returned a verdict of not guilty, petitioner asked to speak, was allowed to, and said to the Court and jury ". . . we first thank God and we thank you". The Court then read the contempt citation as follows:

> "The Court finds as a fact that during the first day of trial of the case of State vs. Joan Little, on the 14th day of July, 1975, the Court directed Mr. Jerry Paul, Chief Counsel for the defendant, Joan Little, to sit down three times before the said Paul did so after a ruling of the court to which the said Jerry Paul was vocally objecting. The court then admonished the said Jerry Paul that when a court ruled it was a ruling of the court and further statements of counsel critical of the ruling were not in order.
>
> The Court further finds as a fact that on the following day, July 15, 1975 at 2:55 o'clock p.m. when the court was hearing defense counsel, Jerry Paul, in the absence of the prospective juror Jenny Lancaster, in reference to the

court's ruling on certain questions propounded to said juror by defense Jerry Paul. On that occasion Jerry Paul in a very loud voice stated that the court's rulings were denying the defendant an opportunity to effectively pick good jurors and to return to the method the court was suggesting was to return to a hundred years ago and made absolutely no sense whatever, at which time the court denied the defense counsel the right to ask certain questions in the manner put by defense counsel to which Jerry Paul answered in a very loud voice that any questions the state asked, they were allowed to ask, and the questions he wanted to ask were not being allowed to ask and that the court was showing bias in favor of the State and was not giving to the defense a fair trial. Thereafter, a conversation occurred between the court and the defendant as to the method of asking questions during which time defense counsel, Jerry Paul, stated that the State was taking longer to examine jurors than the defense was taking.

The Court further finds as a fact that this statement as to time consumed by the State was not true at which time Jerry Paul answered that the reason the court was cutting him off was because the defendant was getting an advantage and the court was favoring the State and the court was proceeding in a manner to ensure Joan Little's conviction.

The Court further finds as a fact that the records amply disclose that this was not a true statement at which time the defense counsel, Jerry Paul, in a voice indicating loud anger asked the court to recluse [*sic*] himself because he didn't think that the court was capable of giving Joan Little a fair trial and he didn't intend to sit or stand there and see an innocent person go to jail for any reason and that the court could threaten him with contempt or anything else but it did not worry him, at which time Attorney Jerry Paul instantly turned his back to the court and in a loud voice addressed the News Media and others in the

courtroom and said 'and to sit there and say like the queen of hearts off with the heads, the law is the law, is to take us back one hundred years', whereupon Attorney Jerry Paul then turned back to the court and said that he intended to ask the questions and said in a loud voice, "it is apparent I'm disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway'. Thereafter he made further statements and at the completion of these statements the court inquired if he was through he stated 'I am through for the moment but not through for this trial'.

The Court finds as a fact that the statements made by said Attorney Jerry Paul on said occasion were in manner made to disrupt the trial and in an apparent attempt to force the court at that time to find him in contempt of court in order that a mistrial would result.

The Court concludes from the above findings of fact that the above acts of Jerry Paul as set forth in these Findings of Fact are in direct contempt of this court.

The Court further concludes that in order to keep this trial in progress which was necessary in the ends of justice, this Order was delayed until the Joan Little trial had been completed.

Now, therefore, it is ordered, adjudged and decreed that the said Attorney Jerry Paul is in direct contempt of court and he is hereby ordered in punishment therefor to be confined in the common jail of Wake County for a period of fourteen days.

This the 15th day of August, 1975 and 12:10 p.m. o'clock."

Petitioner was then allowed to make a statement during which he indicated he wanted to "get it over with", rather than delaying service. He seemed to agree with the judge that nothing was personal and that no animosity was involved in the contempt citation. Petitioner's law partner then made

several motions which were denied and gave notice of appeal. The trial judge then offered to help counsel with the procedures necessary to test the contempt citation, and instructed the sheriff to allow petitioner his medication and contact lens solution while in the jail. Petitioner remained in jail five days after which he was admitted to bond.

REASONS A WRIT OF CERTIORARI SHOULD NOT ISSUE

1. No writ of certiorari should issue to review petitioner's contention that notice of the episodes constituting the contempt was not given him. On July 14, 1975, petitioner challenged the judge to find him in contempt as a result of an exchange between them. The following day he was given a transcript of the entire episode, and told it was being converted into a finding. The episode involved included, among other things, an unwarranted accusation of bias against the judge:

> ". . . I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person to to jail for any reason . . .";

a comparison of the judge with a murderous, fictional tryant:

> ". . . to sit there and to say like the Queen of Hearts off with the heads because the law is the law is to take us back a 100 years";

a charge that the judge was linked to attempts to railroad his client:

> ". . . and we intend to ask these questions. . . . It is apparent that I am quite disgusted with the whole matter, whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it";

and a haughty, concluding threat to continue:

> "I am through for this moment but not through for this trial".

A week later, petitioner was told he would be cited for contempt because of this episode and near the end of the trial was told he would be able to speak in his defense. He ended up doing so on two occasions. While it is true that the contempt order, when read, went beyond the written notice previously given, the notice of the episode subsumed notice of its loud and disrespectful manner, the only one of these things ever challenged by the petitioner at any stage during this case. Moreover, after the order was read, petitioner was given a second opportunity to speak, of which he availed himself. He did not register surprise at any thing said in the order, claim lack of notice or dispute the judge. Instead, he said it was a badge of honor to have done as he did if it saved his client. The colloquy went as follows:

MR. PAUL: If your Honor pleases . . . could I make a statement?

THE COURT: Yes sir.

MR. PAUL: If your Honor pleases, as I said this morning, my belief in the innocence of this young lady . . .

THE COURT: Very intense

MR. PAUL: Which was reaffirmed by the jury—would have been an emotional and hard matter. Also, I am a student, as I told you—court this morning of non-violence and sometimes we have to say things in order to accomplish social change.

THE COURT: You understand nothing personal between you and me, don't you?

MR. PAUL: Yes sir. And if saying the things in order to make advances in courts and society and create social change, and if doing what I did resulted in Joan Little going free or any way in contributed to that, then I do not

consider time as any dishonor but as a badge of honor and note Dr. King said we turn jail walls into jails of freedom.

THE COURT: All right, thank you very much. . . .

The above indicates that there was adequate notice and that there is no real dispute over this, and accordingly a writ of certiorari should not issue.

2. The reasons given as petitioner's second ones are not wholly clear to respondent, appearing to be a mixture of notice arguments, protected activity arguments, estoppel arguments, and a claim of insufficiency of proof because of the absence of a jury at the time of contempt. However, none seem right and should not provide a cause for this Court issuing a writ of certiorari. First, the United States Court of Appeals was not bound to view the contempt judgment in the same factual way as the North Carolina Court of Appeals (if in fact it did not). While state court constructions of their laws bind federal courts, *Mullaney v. Wilbur*, 421 US 634 (1975), whether or not something can be contempt as a matter of federal constitutional law is a federal legal issue which federal courts are required to redetermine on their own, *Fay v. Noia*, 372 US 391 (1963). Second, the presumption that an Attorney General's staff member did not oppose petitioner's application for certiorari because she agreed with petitioner on the notice issue is incorrect. The undersigned is informed the reason that it was not opposed was that petitioner's former attorney misrepresented the facts about notice to her and was taken at his word. The undersigned is further informed this was because the petitioner misinformed his prior attorney as to the true status of his notice. Accordingly, "we presume" that this is the reason the former attorney no longer represents the petitioner. Finally, there is no requirement that a contempt be in the presence of the jury, *United States v. Schiffer*, 351 F2d 91 (6 Cir 1965). The petitioner's argument concerning constitutional protection for his activities will be discussed under Reason 3. All of the above indicate that petitioner's reasons set out in his numbered

paragraph 2 should not cause the Court to issue a writ of certiorari.

3. No writ of certiorari should issue to review petitioner's assertion that some of the conduct specified in the contempt order was constitutionally protected activity and therefore the order as a whole must fall. This is evidently based on two items in the order mentioned in footnote 11 of the petition—a request to the judge to recuse himself and a statement of petitioner's intent to continue asking the same questions. This is a plainly incorrect argument. Each of the above was immediately connected with contemptous conduct, not isolated from such conduct, as shown by the following the textual sequences:

"MR. PAUL: The only reason I can see Your Honor is cutting us off is because we are gaining an advantage and Your Honor is favoring the state and Your Honor is proceeding in such a manner to insure Joan Little's conviction.

THE COURT: All right, you got that in the record.

MR. PAUL: And at this point we ask Your Honor recluse [*sic*] yourself because I don't think you are capable of giving Joan Little a fair trial and I don't intend to sit or stand here and see an innocent person go to jail for any reason and you can threaten me with contempt or anything else, but it does not worry me.

THE COURT: All right, you got that in the record.

MR. PAUL: And to sit there and say like the Queen of Hearts off with the heads because the law is the law is to take us back a 100 years.

THE COURT: All right.

MR. PAUL: And we intend to ask these questions. Now Your Honor, they can object and you can sustain, but we intend to keep on asking questions in order for the appellate court to rule whether or not they were proper questions, we have to ask the questions. It is apparent I am

quite disgusted with the whole matter of ever bringing Joan Little to trial anyway. There has been one roadblock after another and one attempt after another to railroad Joan Little and I am tired of it. . . ."

In light of the above contexts (and the manner of the speech), the constitutional protection for the content of the two statements involved becomes subordinate. This is a normal incident of contempt law and *Mayberry v. Pennsylvania*, 400 US 455 (1971) and *In Re Little*, 404 US 553 (1973) provide examples of this. Although the judge in each of these cases was a public official and could be criticized, this Honorable Court indicated the judge could not be criticized in a profane or obscene fashion in the courtroom itself during business hours. However, acceptance of petitioner's argument would change this and insulate a lawyer from most contempt charges. Therefore, his third reason should not be honored as a basis for a writ of certiorari.

4. No writ of certiorari should issue on account of Judge Hobgood's making the contempt decision rather than having another judge adjudicate the matter. The law prohibits adjudication by one personally embroiled, see "Contempt Proceedings—Due Process", Annot., 39 L. Ed. 2d 1031, 1040 (1974). However, there is nothing in the record of this case which would support such a conclusion. There is direct evidence that a reasonable amount of good will and mutual respect existed between the parties at the time of petitioner's hearing when the adjudication of contempt became final and the sentence was imposed. In fact, petitioner himself admitted there was nothing personal in the judge's actions. The majority's opinion in the case below (Petition pp A-23, 24) adequately disposes of petitioner's arguments in this regard and no writ of certiorari should issue on account of this argument.

CONCLUSION

Petitioner has shown no basis why a writ of certiorari should

issue to relieve him of the remaining nine days of his sentence. Accordingly, his application for same should be denied.

Submitted as the Brief in Opposition to the Petition for Writ of Certiorari, this the 24 day of September, 1977.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

Richard N. League
Assistant Attorney General

Box 629
Raleigh, North Carolina 27602
919-829-7185